

IN THE SUPREME COURT OF THE STATE OF ALASKA

RESOURCE DEVELOPMENT COUNCIL )  
FOR ALASKA, INC.; ALASKA TRUCKING )  
ASSOCIATION, INC.; ALASKA MINERS )  
ASSOCIATION, INC.; ASSOCIATED )  
GENERAL CONTRACTORS OF ALASKA; )  
ALASKA CHAMBER; and ALASKA )  
SUPPORT INDUSTRY ALLIANCE, )

Appellants and Cross-Appellees, )

v. )

KEVIN MEYER, in his official capacity, )  
as Lt. Governor of the State of Alaska; )  
GAIL FENUMIAI, in her capacity as Director )  
of the Alaska Division of Elections; the )  
STATE OF ALASKA, DIVISION OF )  
ELECTIONS, )

Appellees, )

v. )

VOTE YES FOR ALASKA'S FAIR SHARE, )

Appellee and Cross-Appellant. )

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Trial Court Case No. 3AN-20-05901CI

Supreme Court No. S-17834/17843

APPEAL FROM THE SUPERIOR COURT  
THIRD JUDICIAL DISTRICT AT ANCHORAGE  
THE HONORABLE THOMAS A. MATTHEWS, PRESIDING

**APPELLANTS/CROSS-APPELLEES' REPLY BRIEF**

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## **AUTHORITIES PRINCIPALLY RELIED UPON**

### **Alaska Statute 15.45.110. Circulation of petition; prohibitions and penalty.**

- (a) The petitions may be circulated throughout the state only in person.
- (b) [Repealed, § 92 ch 82 SLA 2000.]
- (c) A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.
- (d) A person or organization may not knowingly pay, offer to pay, or cause to be paid money or other valuable thing to a person to sign or refrain from signing a petition.
- (e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.
- (f) In this section,
  - (1) “organization” has the meaning given in AS 11.81.900;
  - (2) “other valuable thing” has the meaning given in AS 15.56.030(d);
  - (3) “person” has the meaning given in AS 11.81.900.

### **Alaska Statute 15.45.130. Certification of circulator.**

Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance

- (1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105;
- (2) that the person is the only circulator of that petition;
- (3) that the signatures were made in the circulator’s actual presence;
- (4) that, to the best of the circulator’s knowledge, the signatures are the signatures of the persons whose names they purport to be;

(5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110(c);

(7) that the circulator has not violated AS 15.45.110(d) with respect to that petition;  
and

(8) whether the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition.

## **I. INTRODUCTION**

Resource Development Council respectfully asks this Court to affirm the superior court's statutory interpretation of AS 15.45.110(c) to cap circulator payment at \$1 or less per signature collected regardless of how the ballot group structures circulator compensation. Further, this Court should interpret the signature-invalidating statute, AS 15.45.130, to give meaning to the word "properly" in the statutory phrase "properly certified" and hold that the lieutenant governor may not count subscriptions on petitions not properly certified by a Certification Affidavit. A petition is not "properly certified" if the Certification Affidavit untruthfully states compliance with AS 15.45.110(c)'s payment cap, when in reality the circulator was paid in excess of that cap. The superior court's ruling that AS 15.45.110(c) unconstitutionally burdens petition circulation must be reversed as premature and without factual support. The superior court's ruling that AS 15.45.130 constitutes the disenfranchisement of the signatory is plainly wrong as a matter of logic and law. Ballot groups remain free to gather subscriptions but never submit them to the State, and no signatory has the right to vote on a petition merely because he or she has signed.

Finally, this Court should review the undisputed evidence submitted in Resource Development Council's ripe Motion for Summary Judgment located at Exc. 224-226 that 24 professional circulators from Las Vegas-based Advanced Micro Targeting, Inc. ("AMT"), working on behalf of Fair Share, were all paid in excess of Alaska's payment cap and all falsely certified on their Certification Affidavits compliance with Alaska's

payment cap in submitting their petitions.<sup>1</sup> These circulators were paid between \$1.79 and \$68.72 per signature collected.<sup>2</sup> Pursuant to AS 15.45.130, these circulators submitted petitions “not properly certified” because their Certification Affidavits contained false statements of compliance with Alaska’s payment cap. This Court should rule that “the lieutenant governor may not count subscriptions on [these] petitions” because they were “not properly certified” at the time Fair Share submitted them to the lieutenant governor.<sup>3</sup>

## **II. DISCUSSION**

Acting through their elected representatives, the people of Alaska enacted a cap on circulator payment. There has been no legislative effort, through direct democracy or the legislature, to revise or eliminate the payment cap. The payment cap is the law. Further, the people of Alaska, again acting through their representatives, enacted a law that required petition circulators to certify their compliance with circulation rules, and provided that the lieutenant governor may not count subscriptions on petitions not “properly certified.” This case is about upholding these laws.

### **A. A Petition is Not “Properly Certified” Under AS 15.45.130 If the Circulator Falsely Completes the Certifications**

Fair Share’s and the State’s position that a “properly certified” petition under AS 15.45.130 is the same as a “certified” petition begs credulity and violates the bedrock rule of statutory construction that a court is to interpret a statute to give meaning to every word and to ensure a word is not rendered superfluous. Fair Share and the State came to this

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<sup>1</sup> Appellants’ Opening Br. at 7-8.

<sup>2</sup> *Id.* at 8.

<sup>3</sup> AS 15.45.130



conclusion by misinterpreting this Court’s decision in *North West Cruiseship*, ignoring a fundamental rule of statutory construction, and ignoring that Certification Affidavits for petitions are comprised in a way that does not permit a circulator to partially certify a petition.

*North West Cruiseship* does not suggest that “properly certified” means the same as “certified.” That case dealt with a trade group’s challenges to the lieutenant governor’s approval of an initiative for the ballot that sought to impose new requirements on the cruise ship industry.<sup>4</sup> One of the trade group’s challenges was to disqualify the petitions and subscriptions contained therein supported by circulator affidavits that were self-notarized, instead of being witnessed and signed by a public notary.<sup>5</sup> Alaska’s self-certification statute required the individual attempting to self-notarize to provide the location where the self-notarization was taking place.<sup>6</sup> Because the Division of Election’s **pre-printed certification forms** did not include a space for “location,” the self-notarized petition booklets submitted in support of the tax initiative lacked the location of execution.<sup>7</sup>

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<sup>4</sup> *North West Cruiseship Ass’n of Alaska, Inc. v. State*, 145 P.3d 573, 575 (Alaska 2006).

<sup>5</sup> *Id.* at 577.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 577, 584 (the superior court’s opinion, which is attached as an appendix to the Alaska Supreme Court’s decision, reasoned “[t]he Court is unwilling to assume that any single circulator or number of circulators did not properly self-certify, particularly when the forms that the Division provided to the sponsors and circulators expressly indicated that self-certification was an option and gave no description of what constituted the unavailability of a notary public or an official.”).

This Court refused to invalidate the subscriptions. In rejecting this challenge, the Court discussed the purpose of requiring a circulator to notarize (certify) the circulator's affidavit:

[T]he purpose of certification is to require circulators to swear to the truthfulness of their affidavits. That purpose is readily achieved by requiring the circulators to swear that they had stated the truth by signing *under the penalty of perjury*. The failure to write in the name of the place of execution does not reduce the force of that assertion. Furthermore, as we have previously noted, we liberally construe the requirements pertaining to the people's right to use the initiative process so that "the people [are] permitted to vote and express their will on the proposed legislation." We therefore resolve doubts as to technical deficiencies or failure to comply with the exact procedural requirements "in favor of the accomplishment of that purpose." Because the failure to provide a place of execution is a technical deficiency that does not impede the purpose of the certification requirement, we conclude that the petition booklets should not be rejected on these grounds.<sup>8</sup>

The State and Fair Share are conflating the *North West Cruiseship* Court's generic reference to "certification," which simply means turning a statement into a sworn statement, with AS 15.45.130's context-specific usage of the terms "certified" and "certify." Certification under AS 15.45.130 means stating compliance with eight specific statements listed in the statute **and** signing it in front of a notary or self-notarizing it. *North West Cruiseship* correctly reasoned that the purpose of the "certification" of a statement through self-notarizing is the same as having a public notary sign the statement—to ensure the statements are made under oath subject to the penalty of perjury. The Court was making the non-controversial point that a notary or self-notary requirement has one purpose: to hold the declarant accountable for making a knowingly false statement. *North West*

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<sup>8</sup> *Id.* at 577-78.

*Cruiseship* did not purport to interpret AS 15.45.130 or what “properly certified” in that statute means.

The State’s and Fair Share’s reading would make the term “properly” superfluous in AS 15.45.130’s phrase the “lieutenant governor may not count subscriptions on petitions not properly certified.” But when interpreting statutes, this Court presumes the Legislature “intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.”<sup>9</sup> The object is to determine what constitutes “certified” and what constitutes “properly certified” as used in AS 15.45.130.

AS 15.45.130 explains what constitutes a circulator “certifying” a petition. The statute provides that “each petition shall be certified by an affidavit by the person who personally circulated the petition. ... The affidavit must state in substance: [the eight statements of compliance with Alaska’s petition circulation laws in AS 15.45.130(1)-(8)].” A petition is therefore “certified” if the circulator submits with the petition an affidavit making the statements required by AS 15.45.130(1)-(8). The State attaches to each printed petition booklet it issues to the ballot group a “Certification Affidavit” with the eight statements required by AS 15.45.130(1)-(8) pre-printed and all the circulator has to do is sign.<sup>10</sup>

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<sup>9</sup> *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 386 (Alaska 2013).

<sup>10</sup> *North West Cruiseship Ass’n of Alaska, Inc. v. State*, 145 P.3d 573, 584 (Alaska 2006) (recognizing the circulator affidavits as “forms provided to the sponsors”). *See also* Exhibit A to Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion for Summary Judgment (“Plfs’ Summ. J. Mem.”) (July 6, 2020); *see also* 6 AAC 25.240(g).

“Properly certified” means something more, and as the U.S. Supreme Court reasoned,<sup>11</sup> “properly” limits the verb “certified,” which “lead[s] to the inexorable conclusion” that not all certified petitions are “properly certified.” In common usage, “properly” means “in an acceptable or suitable way,” “in an accurate or correct way,” or “appropriate, suitable, right, fit, or correct; according to the rules.”<sup>12</sup> In order to vindicate the Legislature’s intent that the lieutenant governor may not count subscriptions not “properly certified,” the certification must be completed in an accurate or suitable way; according to the rules. A circulator’s false statement of compliance with any of the requirements of AS 15.45.130(1)-(8) is the antithesis of certifying a petition “in an acceptable or suitable way,” “in an accurate or correct way,” or “appropriate, suitable, right, fit, or correct; according to the rules.”

The State asks this Court to ignore the statute’s plain language and instead focus on the burden requiring an investigation into the veracity of each certification for each petition would place on the lieutenant governor, who only has 60 days to approve or reject a petition for the ballot.<sup>13</sup> This is a strawman argument. No party has asserted that AS 15.45.130 requires the lieutenant governor to engage in such an investigation. Other state supreme courts have easily resolved this problem. As the Montana Supreme Court reasoned in invalidating over 64,000 petition subscriptions and removing an initiative from the ballot “it has long been established that initiative petitions signed and filed in accordance with

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<sup>11</sup> *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005).

<sup>12</sup> *See* Appellants’ Opening Br. at 30.

<sup>13</sup> State Appellees Br. at 13-16.

applicable law are presumptively valid. However, that presumption of validity may be rebutted and overcome by affirmative proof of willful fraud or procedural noncompliance.”<sup>14</sup> Here, the law presumed the petitions filed by Fair Share were valid, but Resource Development Council’s showing in this lawsuit of procedural noncompliance by Fair Share’s circulation rebuts that presumption. Resource Development Council has put forward affirmative proof of procedural noncompliance by Fair Share’s professional circulators that rebuts the presumption of validity with Fair Share’s petitions; specifically, that these circulators were paid in excess of the payment cap but falsely certified compliance with the cap. This Court should not permit the lieutenant governor to wipe his hands of protecting Alaska’s initiative procedures because he could not have gathered the evidence on his own in 60 days. The lieutenant governor should act on the affirmative proof that Fair Share and Advanced Micro Targeting, Inc. (“AMT”) committed a crime under AS 15.45.110(e) by ignoring the payment cap and the professional circulators compounded this misconduct by filling false affidavits in support of the petitions. This Court should not buy the lieutenant governor’s strawman argument.

The State curiously argues that because the Legislature criminalized a circulator’s receipt of payment in excess of AS 15.45.110(c)’s cap and false statement on a Certification Affidavit that AS 15.45.130 does not say what it means and invalidation of petition signatures is an unwarranted remedy for a circulator’s false affidavit.<sup>15</sup> This

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<sup>14</sup> *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 775 (Mont. 2006) (citing *In re State Question No. 138*, 244 P. 801, 803 (Okla. 1926)).

<sup>15</sup> State Appellees Br. at 16-17.

appears to be a part of the State’s strategy to have this Court follow the outdated and sharply divided Missouri Supreme Court’s decision in *United Labor Committee of Missouri v. Kirkpatrick*.<sup>16</sup> But the weight of modern authority from state supreme courts recognizes that a legislature’s conclusion that false certification is a crime *enhances*, not diminishes, the argument to invalidate otherwise valid subscriptions gathered by circulators engaged in procedural noncompliance with the circulation rules.<sup>17</sup> This Court should reject the State’s illogical reliance on *Kirkpatrick* that has been rejected by the weight of modern authority that concludes the legislature’s enactment of criminal sanctions supports the remedy of invalidation of petition signatures.

Nor does 6 AAC 25.240(g), a regulation promulgated by the Division of Elections that the State cites for the first time in this lawsuit in its opposition brief, change AS 15.45.130’s meaning. That regulation does not attempt to define “properly certified” but instead confirms that certification under AS 15.45.130 requires the circulator to complete the pre-printed Certification Affidavit that accompanies each petition booklet.<sup>18</sup> 6 AAC 25.240(g) merely requires each circulator to sign the pre-printed form that the

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<sup>16</sup> *United Labor Committee of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 453 (Mo. 1978).

<sup>17</sup> See e.g. *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 80-81 (Me. 2002) (invalidating subscriptions and noting that the Maine Legislature made providing a false circulator affidavit a “Class E crime”); *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32, 41-42 (Okla. 2006) (reasoning that the Oklahoma Legislature’s enactment of criminal sanctions for false circulator affidavits made invalidation of signatures the proper remedy); see also Exc. 54-63 (Resource Development Council’s briefing of this issue below).

<sup>18</sup> See Exc. 224 (Exhibit A to Plfs’ Summ. J. Mem.).

Division of Elections attaches to each booklet. It does not explain what constitutes a “certified” petition and what constitutes a “properly certified” petition.

The State’s and Fair Share’s attempts to conflate a “certified” petition, which is accomplished with an affidavit agreeing to the eight statements in AS 15.45.130(1)-(8), and a “properly certified” petition, which means the certification is accurate and completed according to the rules, are unpersuasive. This Court should hold a petition is not “properly certified” if it includes false statements of compliance with any of the requirement of AS 15.45.130(1)-(8).

**B. AS 15.45.130’s Invalidation of Subscriptions Gathered by Circulators in Violation of Alaska Law Does Not Disenfranchise Any Alaskan Voter**

The superior court ruled that AS 15.45.130 unconstitutionally disenfranchises Alaska voters or unconstitutionally restricts their free speech rights, if the statute is read to permit the lieutenant governor to invalidate subscriptions supported by false affidavits. Resource Development Council’s Opening Brief demonstrated that this ruling is clear error because no person signing a petition has a reasonable expectation, let alone right, to vote on that proposal.<sup>19</sup> The ballot group can decide to gather the signatures but never submit them to the State. Circulators of a petition could fail in gathering enough signatures to gain ballot access. Or the circulators could be engaged in wrongdoing or procedural noncompliance that disqualifies their activities. Simply put, a state’s invalidation of

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<sup>19</sup> Appellants’ Opening Br. at 37-45.

signatures on a petition is not voter “disenfranchisement” because merely signing a petition does not create any right to vote on that petition.<sup>20</sup>

Neither Fair Share<sup>21</sup> nor the State put up substantial resistance to this body of law. Instead, the State points to *North West Cruiseship*’s liberal interpretation of a now-deleted portion of a **regulation** promulgated by the Division of Elections as precedent to reject Resource Development Council’s interpretation of AS 15.45.130.<sup>22</sup> The case for not striking signatures is stronger in this appeal than in *North West Cruiseship*, the State argues, because the circulator error in *North West Cruiseship*—failure to include the “paid by” language on two pages in two petition booklets—could have caused signatories who would have refused to sign had they known who was bankrolling the signature gathering to sign the petition booklet.<sup>23</sup>

While that conclusion may be sound as a matter of general policy, it is not this Court’s to make. The Alaskan people, acting through their representatives, have answered the question in AS 15.45.130: “In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted.”<sup>24</sup> A court cannot subvert the intent of the Legislature contained in a **statute** because it disagrees with the Legislature’s decision.

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<sup>20</sup> See e.g. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993); *Kendall v. Balcerzak*, 650 F.3d 515, 522 (4th Cir. 2011).

<sup>21</sup> Fair Share Answering Br. at 13-14.

<sup>22</sup> State Appellees Br. at 18-20.

<sup>23</sup> *Id.* at 18-19.

<sup>24</sup> AS 15.45.130.



A court may ignore the Legislature’s intent only if the statute suffers from fatal constitutional flaws.<sup>25</sup> But neither the State nor Fair Share has alleged, let alone shown, that AS 15.45.130’s invalidation of subscriptions on petitions “not properly certified” abridges any of the initiative provisions in the Alaska Constitution at Article XI, §§ 1-4.

This Court should not ignore the Legislature’s intent because it feels that result is too harsh. Alaskans, through their elected representatives, have already decided that invalidation is warranted, and no voter is disenfranchised by vindicating Alaska’s signature-invalidating statute.

**C. This Court Must Reverse the Superior Court’s Ruling that AS 15.45.110(c) is Unconstitutional because There is No Evidence that It is Unconstitutional**

The superior court ruled, on a motion to dismiss, that AS 15.45.110(c) unconstitutionally burdens the free speech rights of petition circulators. The trial court reached this conclusion without any evidence that the payment cap burdened petition circulation in Alaska at all.<sup>26</sup> As the State points out, this was clear error: “The superior court struck down AS 15.45.110(c) based on pure speculation, without any [] factual record analyzing the purported burden on political speech.”<sup>27</sup> As pointed out in Resource Development Council’s prior brief, all of the cases cited by Fair Share confirm that Fair Share must show, through admissible evidence, the burden the cap places on petition

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<sup>25</sup> See e.g. *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 184 (Alaska 2009) (applying the doctrine of constitutional avoidance only after determining the statute was ambiguous).

<sup>26</sup> See Exc. 238-246.

<sup>27</sup> State Appellees Br. at 26-29.

circulation.<sup>28</sup> The U.S. Supreme Court’s decisions in *Meyer v. Grant*<sup>29</sup> and *Buckley v. American Constitutional Law Foundation, Inc.*<sup>30</sup> require proof. The Ninth Circuit’s decision in *Prete v. Bradbury* requires proof.<sup>31</sup> The portion of the trial court’s decision ruling AS 15.45.110(c) unconstitutional based on pure speculation must be corrected.

**D. AS 15.45.110(c)’s Plain Language Prohibits Circulators from Receiving Any Form of Payment that Exceeds \$1 Per Signature Gathered, and the Legislative History of the Statute Confirms that was the Legislature’s Intent**

Fair Share and the State ask this Court to reverse the superior court’s interpretation of AS 15.45.110(c) to prohibit circulator payment in excess of \$1 per signature gathered regardless of how the ballot group structures the payment. To do so, they ask this Court to *presume* the plain language of AS 15.45.110(c), which is confirmed by its legislative history, unconstitutionally infringes on petition circulators’ free speech rights, and to avoid unproven constitutional problems by interpreting it to exempt from its cap circulators who receive compensation on an hourly or salary basis. This would be error.

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<sup>28</sup> See Resource Development Council’s Cross-Appellees’ Br. at 26-29 (Aug. 6, 2020).

<sup>29</sup> *Meyer v. Grant*, 486 U.S. 414, 417-18 & n.6 (1988) (“brief trial” held for party challenging Colorado’s statutory ban on circulator payment to present evidence of burden on petition circulation).

<sup>30</sup> *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192-94 (1999) (discussing the statistical evidence and the “trial testimony” that “complemented the statistical picture” of the burden Colorado’s circulation laws requiring circulators wear a badge stating their name and whether they were volunteers or paid (including the name and number of their employer) had on petition circulation in Colorado).

<sup>31</sup> *Prete v. Bradbury*, 438 F.3d 949, 962-68 (9th Cir. 2006) (rejecting contention that circulators merely need to show that a restriction on the payment of petition circulators will reduce the “pool of available circulators” to constitute a constitutional infringement on petition circulation, walking through the evidence submitted in the forms of affidavits, and rejecting constitutional challenge to Oregon’s ban on per-signature payment of circulators).

The superior court ruled that AS 15.45.110(c)'s plain terms unambiguously prohibited all form of circulator payment in excess of \$1 per signature and that the “wording of the statute does not suggest it is capable of supporting Fair Share’s interpretation ...” that it exempts hourly and salary forms of compensation.<sup>32</sup> The statute does not distinguish between forms of compensation and simply caps circulator payment at \$1 or less per signature gathered regardless of how the ballot group structures the payment. The superior court went further and reviewed the legislative history, which confirms that the Legislature explicitly considered and **rejected** a provision that would have exempted hourly and salary compensation from AS 15.45.110(c)'s cap.<sup>33</sup>

As to this issue, the superior court’s analysis was sound. Fair Share and the State do not seriously dispute it, and spend only minimal real estate in their briefs (the State, one page, and Fair Share, one sentence) arguing that the statute can be read two different ways.<sup>34</sup>

Binding precedent forecloses Fair Share’s and the State’s request this Court apply the constitutional avoidance doctrine.<sup>35</sup> “[C]onstitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible

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<sup>32</sup> Exc. 235. “The plain meaning of the words suggest no ambiguity.” *Id.*

<sup>33</sup> Exc. 236-238.

<sup>34</sup> State Appellees Br. at 25-26 (one page); Fair Share Answering Br. at 14 (one sentence).

<sup>35</sup> See *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388 (Alaska 2013) (refusing to apply the constitutional avoidance doctrine to the Protection of Lawful Commerce in Arms Act because the PLCAA was unambiguous and the challenging party did not prove it was unconstitutional as written).

of more than one construction.”<sup>36</sup> AS 15.45.110(c) is unambiguous and no party has shown its plain language unconstitutionally burdens petition circulators’ free speech rights. In *Bigley v. Alaska Psychiatric Institute*,<sup>37</sup> this Court applied the constitutional avoidance doctrine to an ambiguous statute that required a court hearing, after the state petitioned to involuntarily medicate a patient, on whether the patient was giving his “informed consent” and “capacity.” The statute was “silent on the timing of the constitutionally-mandated inquiry under *Myers* [*v. Alaska Psychiatric Institute*]<sup>38</sup> into the patient’s best interests and the availability of a less intrusive alternative.”<sup>39</sup> This was “unsurprising,” given that the requirements were “imposed by the *Myers* ruling after the statute was enacted and were very likely not contemplated by the legislature at all.”<sup>40</sup>

Here, AS 15.45.110(c) is unambiguous. As the superior court correctly concluded: “The plain meaning of the words suggest no ambiguity.”<sup>41</sup> The Alaska Legislature passed AS 15.45.110(c) in 1998,<sup>42</sup> a decade after the U.S. Supreme Court’s decision in *Meyer v. Grant*.<sup>43</sup> The superior court correctly recognized that the Legislature was “mindful of

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<sup>36</sup> *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (original quotation marks and citations omitted); *see also Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 184 (Alaska 2009) (applying the doctrine of constitutional avoidance only after determining the statute was ambiguous).

<sup>37</sup> *Bigley*, 208 P.3d at 184.

<sup>38</sup> *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 (Alaska 2006).

<sup>39</sup> *Bigley*, 208 P.3d at 184.

<sup>40</sup> *Id.*

<sup>41</sup> Exc. 235.

<sup>42</sup> *See* § 2 of Chapter 80, Session Laws of Alaska 1998.

<sup>43</sup> *Meyer v. Grant*, 486 U.S. 414 (1988).

*Meyer v. Grant*” in passing AS 15.45.110(c).<sup>44</sup> The constitutional avoidance doctrine is inapplicable because AS 15.45.110(c) is not ambiguous.

The doctrine is also inapplicable because no party has shown AS 15.45.110(c)’s plain language is unconstitutional. Before applying the doctrine of constitutional avoidance “a party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation.”<sup>45</sup> In *Estate of Kim ex rel. Alexander v. Coxe*, the estate of a woman shot and killed by a man sued the Juneau firearm store that sold the man the rifle.<sup>46</sup> The store defended in part by asserting immunity under federal statutes that bar negligence claims against the seller of a firearm arising from the purchaser’s criminal use of the firearm.<sup>47</sup> The estate asserted the federal statutes were unconstitutional under numerous provisions of the Alaska and federal constitutions, and asked the Court to interpret the federal statutes in a manner to avoid the constitutional questions.<sup>48</sup> This Court declined, holding that the doctrine of constitutional avoidance does not apply where: (1) the statute is unambiguous, or (2) the party challenging the constitutionality of the statute has not proven it is, indeed, unconstitutional.<sup>49</sup> Therefore, the Court held that the superior court correctly refused to apply the doctrine.<sup>50</sup>

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<sup>44</sup> Exc. 237. “It seems that the legislature attempted to get as close as possible to prohibiting payment to petition circulators, mindful of *Meyer v. Grant*.”

<sup>45</sup> *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388 (Alaska 2013).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 386.

<sup>48</sup> *Id.* at 388-92.

<sup>49</sup> *Id.* at 388.

<sup>50</sup> *Id.*

No party to this appeal has shown that the Alaska Constitution or the U.S. Constitution bars Alaskans, acting through their elected representatives, from capping circulator payment at \$1 per signature gathered. The cases make clear the superior court committed reversible error in ruling AS 15.45.110(c) unconstitutional based on pure speculation. Courts must weigh the actual burden a statute restricting circulator payment has on petition circulation before ruling it unconstitutionally burdens petition circulation.<sup>51</sup> Nor may a court *presume* AS 15.45.110(c)'s cap on circulator payment regardless of the form of compensation is unconstitutional, as the State and Fair Share ask this Court to do in applying the constitutional avoidance doctrine to the statute.

**E. This Court Should Correct the Superior Court's Failure to Declare the Petitions Submitted by AMT-Paid Circulators Were Not "Properly Certified" Under AS 15.45.130**

On July 6, 2020, Resource Development Council filed its motion for summary judgment.<sup>52</sup> That motion demonstrated that the undisputed material facts entitled Resource Development Council to judgment as a matter of law that all 24 AMT-paid circulators were paid in excess of \$1 per signature, for the collection of signatures,<sup>53</sup> and that they falsely certified on their Certification Affidavits accompanying their petitions that they had complied with Alaska's cap on circulator payment while gathering the signatures.<sup>54</sup> Fair

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<sup>51</sup> See *Meyer v. Grant*, 486 U.S. 414, 417-18 & n.6 (1988); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 (1999); *Prete v. Bradbury*, 438 F.3d 949, 962-63 (9th Cir. 2006).

<sup>52</sup> Exc. 221-223, 224.

<sup>53</sup> *Id.* (Plfs' Summ. J. Mem. at 8-9 and Exhibit E (July 6, 2020)).

<sup>54</sup> *Id.* (Plfs' Summ. J. Mem. at 8-9 and Exhibit A).

Share opposed the motion on legal grounds, asserting that AMT circulator pay complied with AS 15.45.110(c) and that they truthfully certified compliance with the payment cap.<sup>55</sup>

But, Fair Share did not dispute the following material facts:

- In total, Fair Share submitted 44,881 total subscriptions contained in 19OGTX petitions. The lieutenant governor disqualified 5,707 of the total 44,881 subscriptions, leaving 39,174 qualifying subscriptions in support of the 19OGTX initiative.<sup>56</sup>
- The 24 AMT-paid circulators submitted 30,232 or 67% of the 44,881 total subscriptions submitted. The lieutenant governor disqualified 4,367 of the total 30,232 AMT-gathered signatures, leaving 25,865 qualifying signatures gathered by AMT in support of the 19OGTX initiative.<sup>57</sup>
- All 24 AMT-paid circulators were paid in excess of \$1 per signature gathered.<sup>58</sup>
- All 24 AMT-paid circulators certified on their Certification Affidavits that they collected the signatures contained in their petitions while complying with Alaska's cap on circulator payment.<sup>59</sup>

If this Court (1) affirms the superior court's statutory interpretation of Alaska's cap on circulator payment at AS 15.45.110(c), (2) rejects Fair Share's fatally flawed constitutional challenges of AS 15.45.110(c) and AS 15.45.130, and (3) agrees with Resource Development Council's interpretation of AS 15.45.130, the above-described

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<sup>55</sup> Exc. 225 (Fair Share's Opposition to Plaintiffs' Motion for Summary Judgment at 2 (July 10, 2020) ("Fair Share hereby incorporates by reference the arguments presented in its Motion to Dismiss, dated May 18, 2020; its Reply in Support of Its Motion to Dismiss, dated June 9, 2020; and its Opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment, dated June 17, 2020)).

<sup>56</sup> Exc. 224 (Plfs' Summ. J. Mem. at 8-9 and Exhibit B at 31 and Aff. of Lee Baxter ("Baxter Aff."), ¶¶ 5-10 (July 6, 2020)).

<sup>57</sup> *Id.* (Plfs' Summ. J. Mem. at 8-9 and Baxter Aff., ¶¶ 5-10).

<sup>58</sup> *Id.* (Plfs' Summ. J. Mem. at 8-9; *see* Baxter Aff., ¶ 10).

<sup>59</sup> *Id.* (Plfs' Summ. J. Mem. at 1 and Exhibit A).

undisputed facts establish that Resource Development Council is entitled to prevail on this appeal. If Resource Development Council prevails, the Court should issue a decision granting Resource Development Council's motion for summary judgment and invalidating the 25,865 qualifying signatures AMT-paid circulators gathered in support of the 19OGTX initiative.<sup>60</sup>

Typically, this Court would not, in the first instance, issue a ruling on a motion for summary judgment. However, this case presents a unique procedural background that left Resource Development Council unable to obtain a ruling that seeks to enforce AS 15.45.130 and disqualify petitions that were not properly certified because they are supported by false affidavits. If the law is to be upheld, it will require this Court's directing the State not to include the Fair Share initiative on ballots when the State sends those to the printers on September 2, 2020.<sup>61</sup>

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<sup>60</sup> Resource Development Council was diligent in presenting the evidence in its motion for summary judgment to the superior court. After the lieutenant governor's March 17, 2020 decision that there were sufficient qualifying signatures to place the 19OGTX initiative on the upcoming general election ballot, Resource Development Council launched this lawsuit, obtained discovery from AMT and Fair Share, and filed a motion for summary judgment. *See* Appellants' Opening Br. at 9-11. On July 6, 2020, Resource Development Council filed its summary judgment brief with the superior court under seal because it contained references and attached documents that AMT and Fair Share had unilaterally designated as "confidential" under a standard protective order. *Id.* at 9-10. Fair Share responded on July 10, 2020. Exc. 225. Resource Development Council filed its Reply on July 14, 2020. Exc. 226. Two days after the motion became ripe, on July 16, 2020, the superior court issued its order granting the State's and Fair Share's motions to dismiss. Exc. 227-256.

<sup>61</sup> *See* Unopposed Motion to Expedite Appeal at 1-2, S-17834 (July 20, 2020) ("This appeal concerns the inclusion of the 19OGTX initiative on the ballot for the upcoming general election on November 3, 2020. Expedited consideration is necessary so that the Court may resolve this matter before the Division of Elections sends the ballot to the printers on September 2, 2020.").



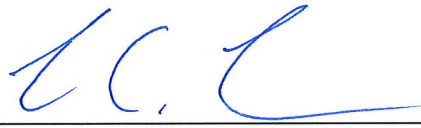
### III. CONCLUSION

For the foregoing reasons, this Court should uphold the superior court's interpretation of AS 15.45.110(c) and reject its fatally flawed constitutional analysis of that circulator payment cap. Further, this Court should reject the superior court's erroneous statutory interpretation and constitutional analysis of AS 15.45.130, and rule that "the lieutenant governor may not count subscriptions on [AMT-paid] petitions" because they were "not properly certified" at the time Fair Share submitted them to the lieutenant governor.

DATED at Anchorage, Alaska this 12th day of August, 2020.

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